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Testimony of Houston Putnam Lowry

OPPOSING IN PART

House Bill 5639, AAC Connecticut's Leadership in Corporation and Business Law

Judiciary Committee

March 23, 2016

Our law firm generally represents businesses regarding commercial matters within the State of Connecticut (and not the consumer context). While we usually support this type of legislation, we have the following serious concerns about this particular bill:

We agree with the concept of establishing a "business session" of the Superior Court for larger commercial matters. Given the fairly languid pace of Connecticut lawsuits, the \$25/day/per party fee is excessive and punitive (line 3187). If a case is pending for a year, this means the fee will be \$13,000 for a case with only two parties. If a complex case is pending for three to five years (not unusual for Connecticut dockets), this means the minimum fee would range between \$39,000 and \$65,000. This is clearly unacceptable. A maximum fee should be established, not to exceed the \$1,000-\$3,000 range. The fee might be suspended while the court has an issue under advisement, if it remains a per diem fee without a maximum.

I have no idea how the Judicial Branch will be able to propose 30 judges to handle a commercial matter (line 3202). There are only 160 judges in the State of Connecticut. As a practical matter, many of the Judicial Districts have begun moving towards an individual docket (although most judges do not have in-depth experience in commercial matters as defined by this bill). This means a single judge will normally be assigned to a case for its duration. The business session should have dedicated judges assigned to it.

The "Connecticut Rapid Arbitration Act" (§114) should be stripped from this bill. While this is an "opt-in" regime, very few people will want to opt in.

The General Assembly would be better served if enacted the following instead:

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1. An act validating the parties' choice of Connecticut law (see attached draft language based upon a New York statute, New York general obligation §5-1401.¹). Other states have similar legislation, such as California Civil Code §1646.5,² Delaware Code §2708(a),³ Florida §685.101,⁴ and 735 Ill. Compiled Statutes §105/5-5.⁵

¹ §5-1401. Choice of law. 1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one of section 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code.

2. Nothing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement or undertaking.

² Notwithstanding Section 1646, the parties to any contract, agreement, or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than two hundred fifty thousand dollars (\$250,000), including a transaction otherwise covered by subdivision (a) of Section 1301 of the Commercial Code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state. This section does not apply to any contract, agreement, or undertaking (a) for labor or personal services, (b) relating to any transaction primarily for personal, family, or household purposes, or (c) to the extent provided to the contrary in subdivision (c) of Section 1301 of the Commercial Code.

This section applies to contracts, agreements, and undertakings entered into before, on, or after its effective date; it shall be fully retroactive. Contracts, agreements, and undertakings selecting California law entered into before the effective date of this section shall be valid, enforceable, and effective as if this section had been in effect on the date they were entered into; and actions and proceedings commencing in a court of this state before the effective date of this section may be maintained as if this section were in effect on the date they were commenced.

³ The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties if the parties, either as provided by law or in the manner specified in such writing are, (i) subject to the jurisdiction of the courts of, or arbitration in, Delaware and, (ii) may be served with legal process. The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State.

⁴ (1) The parties to any contract, agreement, or undertaking, contingent or otherwise, in consideration of or relating to any obligation arising out of a transaction involving in the aggregate not less than \$250,000, the equivalent thereof in any foreign currency, or services or tangible or intangible property, or both, of equivalent value, including a transaction otherwise covered by s. 671.105(1), may, to the extent permitted under the United States Constitution, agree that the law of this state will govern such contract, agreement, or undertaking, the effect thereof and their rights and duties thereunder, in whole or in part, whether or not such contract, agreement, or undertaking bears any relation to this state.

2. 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration (§50a-100, et seq).
3. 2002 UNCITRAL Model Law on International Commercial Conciliation.
4. 2000 Revised Uniform Arbitration Act.

If the Judiciary Committee is committed to the Connecticut Rapid Arbitration Act, the following issues need to be resolved:

1. Line 3291 should also refer to Chapter 862 and the portion after the comma in line 3292 should be stricken.
2. The act should not be limited to business entities formed or headquartered in this state (line 3301). The restriction isn't necessary if the parties agree.
3. The Appellate Court does not exercise its rule making authority separately from the Superior Court (lines 3353-3357).
4. Limiting arbitrators to members of the Connecticut bar of more than 10 years is unnecessarily exclusionary (line 3390).
5. In international matters, the default is three arbitrators and this preference is codified at Connecticut General Statutes §50a-111 (which therefore conflicts with lines 3392-3394).

⁵ §5-5. Choice of law. The parties to any contract, agreement, or undertaking, contingent or otherwise, in consideration of or relating to any obligation arising out of a transaction covering in the aggregate not less than \$250,000, including a transaction otherwise covered by subsection (1) of Section 1-105 of the Uniform Commercial Code, may agree that the law of this State shall govern their rights and duties in whole or in part, whether or not the contract, agreement, or undertaking bears a reasonable relation to this State. This Section shall not apply to any contract, agreement, or undertaking (i) for labor or personal services, (ii) relating to any transaction for personal, family, or household services, or (iii) to the extent provided to the contrary in subsection (2) of Section 1-105 of the Uniform Commercial Code. Nothing contained in this Section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement, or undertaking.

6. The arbitrator's counsel should not have the power of the arbitrator to issue decisions (lines 3420-3426). Counsel should only be able to advise the arbitrator.
7. This act does not make it clear an arbitrator has the power to issue interim measures of protection; including prejudgment remedies (see lines 3441-3445).
8. It is possible the hearing may not be concluded within 120 days of the arbitrator's appointment (which would make the arbitrator's award late) (line 3473-3475). Certainly hearings could be started within 120 days after appointment.
9. Superior Court judgments are not automatically a lien on real estate (lines 3524-3529). A certificate of lien needs to be filed in Connecticut.

For these reasons, this bill should not be reported out of committee until it is modified as outlined in this testimony.

AAC CHOICE OF LAW

Section 1 (new) - The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars may agree the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking

- a. for labor or personal services; or
- b. relating to any transaction for personal, family or household services.

Nothing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement or undertaking.

Section 2 (new) - Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding, any person may maintain an action or proceeding against a foreign juridical entity, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of Connecticut law has been made, in whole or in part, pursuant to the foregoing section and which

- a. is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than five hundred thousand dollars, and
- b. which contains a provision or provisions whereby such foreign juridical entity or non-resident agrees to submit to the jurisdiction of the courts of this state.

Nothing contained in this section shall be construed to affect the enforcement of any provision respecting choice of forum in any other contract, agreement or undertaking.